

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

IN THE MATTER OF:

NEW CASTLE COUNTY, DELAWARE,	:	
	:	Representation Petition
and	:	
	:	<u>No. 07-03-560</u>
AFSCME COUNCIL 81, LOCAL UNION 3109,	:	
AFL-CIO.	:	(CLARIFICATION)

RE: COMPENSATION AND PENSION SYSTEMS COORDINATOR

APPEARANCES

Eric Episcopo, Esq., 1st Assistant NCC Attorney
Francis M. Lally, for AFSCME LU 3109

BACKGROUND

New Castle County, Delaware (“County”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”),¹⁹ Del.C. Chapter 13 (1994).

Delaware Public Employees Council 81, American Federation of State, County and Municipal Employees, AFL-CIO (“AFSCME”) is an employee organization within the meaning of 19 Del.C. §1302(i). AFSCME Local Union 3109 is the exclusive bargaining representative of a unit of New Castle County employees defined in DOL Case 100, and is commonly referred to as the “Managers and Professionals” unit.

On or about March 16, 2007, the County filed a Petition for Modification or Clarification of Existing Certified Bargaining Unit with the Delaware Public Employment Relations Board (“PERB”), seeking to modify the existing bargaining unit represented by AFSCME LU 3109 by deleting the position of Compensation and Pension Systems Coordinator. In support of the petition, the County asserted the following:

This position reports directly to the Chief Human Resources Officer. The employee is directly responsible for planning, directing and supervising the entire pension and benefit plans offered to all County employees. The employee has controlling impact on the successful operation of all employee benefit programs. The information the employee obtains regarding costs and analysis is used to negotiate rates and plans with all Local Unions, including 3109. As part of the management team, the employee is involved in discussions related to recruiting, hiring processes, compensation plans and other non-benefit and pension related issues. These essential job functions and the employee’s advanced knowledge about issues involved in collective bargaining make it unduly burdensome for New Castle County to negotiate effectively with the Unions.

On or about March 27, 2007, AFSCME responded, objecting to the County’s petition, asserting the Compensation and Pension Systems Coordinator essential job functions and advanced knowledge of issues involved in the collective bargaining process do not meet the statutory criteria to exclude the position from representation. AFSCME also argued that the position has been in the bargaining unit since the position was created in 1979 with no adverse impact upon the County in terms of its ability to successfully negotiate multiple collective bargaining agreements.

By letter dated April 23, 2007, the PERB through this Hearing Officer responded to the parties by noting that a clarification petition is used to resolve a question as to whether a particular position is “confidential” within the meaning of 19 Del.C.§1302(f), and therefore ineligible for representation. In the interest of administrative efficiency,

the Hearing Officer converted the County's request to a Clarification Petition, which can be filed at any time in order to determine whether a position is eligible for representation.

A public hearing was convened on May 17, 2007 in order for the parties to create a factual record on which a determination can be made as to whether the Compensation and Pension Systems Coordinator is a confidential employee as defined by 19 Del.C. §1302(f). The parties provided oral closing argument at the conclusion of the hearing. This decision results from the record thus created by the parties.

ISSUE

Is the position of Compensation and Pension Systems Coordinator employed by New Castle County a "confidential employee" within the meaning of 19 Del.C. §1302(f), and therefore ineligible to continue to be represented within the bargaining unit represented by AFSCME LU 3109?

APPLICABLE STATUTORY PROVISION

"Confidential employee" means any employees whose essential job function and advanced knowledge about the issues involved in collective bargaining would make it unduly burdensome for the employer to negotiate effectively if the employee were a member of an appropriate bargaining unit. 19 Del.C. §1302(f).

PRINCIPAL POSITIONS OF THE PARTIES

New Castle County:

The County argues that the Compensation and Pension Systems Coordinator is clearly a confidential position within the meaning of 19 Del.C. §1302(f). It is a high

level and highly functioning position whose essential responsibilities deal with “issues involved in collective bargaining”, specifically with employee benefits which are mandatory subjects of bargaining under the PERA.

It argues it is unduly burdensome for the County to be required to bargain concerning healthcare benefits without having exclusive access to the Compensation and Pension Systems Coordinator, who has extensive knowledge and experience with those issues. The County needs to have the Compensation and Pension Systems Coordinator available to crunch numbers and to give evaluative input on the unions’ negotiating proposals concerning benefits.

Although this position has not been included on past management negotiating teams, with the increasing costs and importance of healthcare and other benefits, the County argues it is essential to have this position available to support its team in current and future negotiations.

AFSCME:

AFSCME argues that the County has failed to meet the burden of providing persuasive evidence that the Compensation and Pension Systems Coordinator position is a confidential employee and that the representation of this position within the bargaining unit represented by LU 3109 is “unduly burdensome” to the County in collective bargaining. It argues the position has been represented since it was created in 1979, during which time the County has effectively negotiated numerous collective bargaining agreements. During that period of time, the duties and responsibilities of the position have not changed significantly. The information concerning “issues involved in

collective bargaining” to which the County asserts the Compensation and Pension Systems Coordinator is privy, is also available to the unions. The County and the unions representing its employees have created a Benefits Committee which has existed for many years, which contractually has access to “all information relating to benefits.”

FACTS

The following facts were derived from the record created by the parties¹:

New Castle County employs approximately 1,600 full-time employees and 400 seasonal and part-time employees. The majority of County employees are represented in one of seven bargaining units which include AFSCME Locals LU 459 (blue collar); LU 1607 (white collar & professionals); LU 3109 (managers & administrators); LU 3911 (paramedics & 911 operators); LU 2270 (representing School Crossing Guards); and two FOP Lodge 5 units representing County Police rank and file officers and NCC Sheriffs. All bargaining unit members are provided with comprehensive benefit packages (including health and welfare, life insurance, pensions) except for the Crossing Guards who do not receive health insurance benefits because they are part-time employees.

Since at least 1994, the collective bargaining agreements between the County and the unions representing County employees have included a provision entitled Benefits Committee. The Committee is comprised of six members of the County and a representative of each bargaining unit. The specific language of this provision has been

¹ Only the County’s Chief Human Resource Officer testified during the hearing. The job description for the Compensation and Pension Systems Coordinator, and copies of the portion of the 2002 – 2005 and 2005-2008 collective bargaining agreements between the County and AFSCME LU 3109 concerning the Benefits Committee were also placed in evidence.

modified slightly during successive negotiations, resulting in the current language in the 2002-2008 agreement:

18.4 Benefits Committee

The County shall maintain a Labor-Management Health Care Benefits Committee (the "Benefits Committee") which shall consist of a representative designated by each County bargaining unit and six (6) representatives designed by the County, each of whom shall be a participant in the County employee health insurance plan. The Chief Human Resources Officer or designee shall chair the Benefits Committee.

- 18.4.1 The Benefits Committee shall meet for the purpose of reviewing and determining employee benefits available to County employees for the future enrollment periods and the identity of administrators and carriers.
- 18.4.2 The Benefits Committee shall be involved at all stages of the review process, including the development of bid specifications, the review of bids (including costs of each plan), meetings with bidders, the design of a benefits plan, and the selection or termination of plan administrators and consultants. One of the objectives of this review and selection process shall be to foster competition among bidders. During this process the union representatives will be granted full and complete access to all information relating to employee benefits.
- 18.4.3 The Benefits Committee shall meet as often as possible to fulfill the duties identified in paragraphs (18.4.1) and (18.4.2) above, but no less frequently than quarterly. Meeting agendas will be provided in advance and will include quarterly financial updates of the plan. Minutes will be provided after each meeting.
- 18.4.4 Any recommendations reached by the Benefits Committee shall be subject to approval by the membership of the Union. Committee members shall be provided with adequate time and information regarding the proposed recommendation of the Benefits Committee to allow Union members to make an informed decision regarding their health care benefits. Following a decision by the Union membership regarding the proposed recommendation of the Benefits Committee, the Benefits Committee shall meet to vote on the proposed recommendation, which shall require

approval by two-thirds of the members present at the Benefits Committee meeting. With advance notice, the Benefits Committee members may designate a proxy to cast their vote.

The Chief Human Resources Officer (the current incumbent has held the post since April, 2005), has a staff which is headed by five section leaders, who she considers to be “key management staff”. Two of these positions are represented within bargaining units and include:

- Compensation and Pension Systems Coordinator (represented by LU 3109)
- Employee Relations/ Labor Relations Coordinator
- Risk Management
- Human Resources Administrator
- Budget and Procedures Analyst (represented by LU 3109)

The Compensation and Pension Systems Coordinator reports directly to the Chief Human Resources Officer, who reports to the elected County Executive through the Chief Administrative Officer. The Compensation and Pension Systems Coordinator (who is also commonly referred to as the “Pension and Benefits Manager”) manages all of the County’s employee benefit programs, including health and medical insurance, prescription drug plan, deferred compensation, and the Employee Assistance Program. The Coordinator oversees a staff of five employees in the Pension and Benefits group within the Human Resources Department.

The Coordinator provides support to the Pension Board of Trustees, which is an independent body established by County Code charged with responsibility for managing the County’s pension funds. The Coordinator is not a member of the Pension Board, but the CHRO is an ex-officio member. *TR 23*. The Coordinator is responsible for preparing agendas, forwarding information and distributing minutes for the monthly meetings of the Pension Board. The Chief Human Resources Officer testified neither she nor the

Coordinator “has much of anything to do with the pension outside of getting approval from the Board of Trustees.” *TR 23*.

The Coordinator currently chairs the Benefits Committee as the Chief Human Resources Officer’s designee. In this position, she is responsible for the agendas, distribution of financial updates and minutes, and conducting the Committee meetings, which must by contract be held no less frequently than quarterly.

OPINION

In September, 1994, the Public Employment Relations Act (19 Del.C. Ch. 13) went into effect, transferring responsibility for representation proceedings, including bargaining unit determinations from the Governor’s Council on Labor to the Public Employment Relations Board. Any bargaining unit designated as appropriate prior to September 23, 1994, for which an exclusive representative had been certified continued to exist unchanged without the requirement of a review and possible redesignation until a question of appropriateness was raised. 19 Del.C. §1310(f).

Under the predecessor law, Right of Public Employees to Organize (also 19 Del.C. Ch. 13) there were no statutory exclusions for specific category of employees from seeking representation, except for elected officials, prisoners and certified public school employees (who were covered by a separate statute). The Governor’s Council did adopt by case precedent after 1970 a practice of separating supervisors from their subordinates in creating appropriate units.

The PERA identifies two types of positions which cannot be included in an appropriate bargaining unit and are, therefore, ineligible for representation for purposes

of collective bargaining. The first is confidential employees and the second is supervisory employees. §1302(o) defines a public employee to mean

“... any employee of a public employer except:

- (6) Confidential employees of the public employer; and
- (7) Supervisory employees of the public employer, provided however, that any supervisory position in a bargaining unit deemed to be appropriate prior to September 23, 1994 shall so continue, unless said unit is decertified in accordance with §1311(b) of this title, or is modified in accordance with procedures authorized by §1310(e) of this title.

The statutory protection afforded to supervisory employees in unit created prior to September 1994 does not extend to confidential employees.

This petition raises a question as to whether the Compensation and Pension Systems Coordinator is eligible for representation under the PERA. It is not a question of appropriateness nor an effort to modify the bargaining unit. PERB has, by practice, processed eligibility questions as unit clarifications. Consequently, the requirements of PERB Rule 3.4(8), Modification of a Bargaining Unit, do not apply to this petition.²

The synopsis of the bill which amended the Public School Employment Relations Act to create the confidential definition which exists in the PERA stated:

The amended language is intended to limit the definition of “confidential employees” to any employee who has an essential job function or knowledge in connection with issues involved in the collective negotiations process. The reason for excluding confidential employees is to preserve the negotiating balance between the employer and the exclusive bargaining representative and to assure the understanding that employees simply processing personnel information or typing daily records or forms are not

² PERB Rule 3.4(8) Modification of a Bargaining Unit: In the event that there is a substantial modification in the nature of the duties and working conditions of a position within the bargaining unit, or a new position is created which is not covered by the existing bargaining unit definition, or there is some other compelling reason for the Board to consider modifying the designated bargaining unit, the public employer and/or the exclusive bargaining representative may file a petition with the Board ...

excluded as confidential. *Indian River Secretarial Assn, DSEA/NEA & Indian River School District*, Del. PERB, Rep. Pet. 04-02-417, V PERB 3115, 3122 (2004).

The statutory definition of “confidential employee” is narrowly crafted to exclude only those employees who are essentially responsible and who have advanced knowledge about collective bargaining issues which make it unduly burdensome for the employer to collectively bargain effectively. *Indian River Secretarial Assn*, (Supra, 3120). The confidential exclusion protects both the public employer and individual employee from inherent conflicts of interest which concern “issues involved in collective bargaining”. The test of confidentiality is whether the function of the position or the employee’s knowledge concerning these issues “unduly compromises the employer’s ability to effectively negotiate.” *DOL & AFSCME 2038*, Del.PERB, Rep. Pet. 99-05-258, III PERB 1915, 1921 (2000).

In *Capital School District Benefits Specialist*, Del.PERB, Rep. Pet. 94-09-103, II PERB 1975, 1179 (1995), PERB established that the determination of confidential status is dependent upon the specific fact pattern in each case. That determination requires an understanding of the position in question, including the skills, duties and responsibilities of the position, reporting structure, and information concerning the knowledge and exposure the position has to issues involved in collective bargaining. Ultimately, it is the petitioning party’s responsibility to provide persuasive evidence that having the position represented in a bargaining unit compromises the employer’s negotiating position and makes it unduly burdensome for the employer to negotiate effectively because of the position’s function and knowledge concerning collective bargaining issues.

The specific circumstances in this case are unique and raise a very close question. The Compensation and Pension Systems Coordinator position was created in 1979 and has been a bargaining unit position since its creation. During that twenty-eight year period, New Castle County has successfully negotiated collective bargaining agreements with the unions representing the overwhelming majority of its employees and has been party to long-standing and well established relationships with the unions.

The County has also entered into a contractual arrangement with the unions whereby union and county representatives make up a standing Benefits Committee expressly for the purpose of reviewing and monitoring employee benefits programs. On its face, the Committee is a model of labor-management cooperation and evidences a mature and productive relationship between the County and its employees. The Benefits Committee has existed for at least fifteen years.

In the current collective bargaining agreements (2005-2008), the committee was renamed the Labor-Management Healthcare Benefits Committee. It has a defined purpose of meeting to review and determine benefits available to County employees for future enrollment purposes, as well as to identify the administrator and carriers of those benefits. *2005-2008 Agreement between NCC and Local 3109, AFSCME*, §18.4.1. The Benefits Committee is involved in all stages of the benefit review process including: developing bid specifications; reviewing bids and meeting with bidders; design of the benefit plan; and selection and termination of plan administrators and consultants. §18.4.2. The Agreement specifically provides, “During this process the Union representatives will be granted full and complete access to all information relating to employee benefits.”

Once the Benefits Committee makes a recommendation for modifications to the employee benefit plan, that recommendation must be submitted to the membership of the unions for approval. Union representatives on the Benefits Committee are guaranteed adequate time and all necessary information to facilitate an informed vote by the membership. Following the balloting of members, the full Benefits Committee votes to either accept or reject the recommended change, and a supermajority of the Committee members is required to take binding action. §18.4.4

The Chief Human Resources Officer testified the Benefits Committee was restructured during the last negotiations (which concluded approximately two years ago). As a result of those negotiations, the Chief Human Resources Officer was charged with chairing the Committee. She sat as Chair throughout calendar year 2006, but transferred that responsibility to the Compensation and Pension Systems Coordinator for 2007. *Testimony of C. Crowell, TR 17.*

The Chief Human Resources Officer testified she is constrained in her ability to use the Compensation and Pension Systems Coordinator because she feels the position is compromised by being included in the LU 3109 bargaining unit. She wants to be able to use the Compensation and Pension Systems Coordinator to manage and help develop policies and practices that are needed, including those that may help the County to achieve cost savings on benefits. *TR 19.* The Chief Human Resources Officer testified she believes there is an inherent conflict of interest in the Coordinator being represented because the Coordinator must answer to both the County and to the Union.

PERB has addressed the question of conflict of interest in negotiations, albeit in a different context, in *DSTA and Delaware Dept. of Public Safety, Division of State Police*,

Del.PERB, DS 92-01-068, II PERB 787, 792 (1992). In that case, the Delaware State Troopers Association objected to the State's long-standing practice of including State Police Majors (who are bargaining unit members) on its negotiating team. Similar to the facts in the present case, the parties had a history of effective negotiations and a long-standing and successful collective bargaining relationship. The decision established a standard for evaluating alleged conflicts of interest in negotiations, namely that the alleged conflict be of such a nature that it presents a clear and present danger to the collective bargaining relationship. The decision noted the strong negotiation history increased the burden on the petitioning party to "show cause why there is proximate danger inflicted on the collective bargaining process by continuing the practice." The decision in that case concluded that the evidence was insufficient to support a finding that the collective bargaining process had or would be poisoned by the continued use of Majors on the employer's negotiating team.

In the present case, the Chief Human Resources Officer testified she perceives increasing conflicts for the Compensation and Pension Systems Coordinator as benefits and cost savings become more central in the next round of negotiations,³ based both upon the County's fiscal circumstances and escalating costs of benefits both in real dollars and as a percentage of the budget. The County argues that although the Benefits Committee currently participates fully in the healthcare benefit plan design and choice of providers and administrators, it is a contractual creation which could be significantly altered or dissolved at any point through negotiations.

³ The County is currently engaged in negotiations with AFSCME LU 459. The remaining collective bargaining agreements expire in the spring of 2008.

Applying the statutory criteria, there is no evidence on the record to support a finding that it has been “unduly burdensome” for the County to negotiate in the past with the Compensation and Pension Systems Coordinator position in a bargaining unit. It is undisputed that this position has not served as a member of the County’s negotiating team. The only evidence of an alleged conflict is the testimony of the Chief Human Resources Officer that she is hesitant to use the Compensation and Pension Systems Coordinator as fully as she might because she perceives that there could potentially be an issue that confidential information might be disclosed to the unions. There is, however, no evidence before me that this has been a problem or negatively impacted negotiations over the last twenty eight years.

The Chief Human Resources Officer testified she wants to use the Coordinator to evaluate both union and County proposals during negotiations. She testified she has to be careful because the Coordinator is a LU 3109 member, “... so somethings I can communicate with her and ask information, if I’m sure it won’t have a conflict of interest. Somethings I can’t and I may have to get to it a different way before I can actually act upon it or even make a recommendation.” *TR 19*. The testimony did not clarify the type of information or situation to which the Chief Human Resources Officer was referring. She did testify that she would like to have the Coordinator available exclusively to the County negotiating team for purposes of evaluating and costing benefit proposals during negotiations.

Testimony did establish the Compensation and Pension Systems Coordinator is the primary point of contact with the County’s external benefits broker. The broker monitors benefit provider costs and advises the County when less costly provider rates

may be available. *TR 21*. This information, however, concerns the price and cost the County pays for the benefits, which are not subject to collective bargaining.

The evidence of record in this case included the testimony of the CHRO, a copy of the current Coordinator job description, and excerpts of Article 18, Health and Welfare, of the 2002-2005 and the 2005 – 2008 Agreements between the County and AFSCME Local 3109. The burden is on the County as the Petitioner to provide persuasive support for its position that having Compensation and Pension Systems Coordinator position within a bargaining unit makes it “unduly burdensome” for the County to effectively negotiate. This position has existed for nearly thirty years and has always been represented within the Local 3109 bargaining unit. The record does not include specific instances where the negotiating balance between the County and the unions has been compromised, or examples of situations on which to conclude that the County has been unduly burdened in negotiating because the Coordinator position is represented. In fact, the record supports the conclusion that the County and the unions have developed an open and effective method of sharing information and removing the adversarial nature of bargaining with respect to benefits by creating a cooperative Benefits Committee through which information concerning benefits plans, costs and administration are shared and recommendations for changes made through a consensual model. The Benefits Committee moves the discussion of benefits to an on-going process, rather than one which is limited to negotiations for successor agreements.

The determination reached in this decision is specifically based upon the record as it exists and is before me at this point in time. There is no question but that the Compensation and Pension Systems Coordinator is a managerial employee; there is no

exclusion, however, under the PERA for managerial employees. The confidentiality exclusion must specifically relate to advance knowledge of issues involved in collective bargaining. Similar to the circumstances underlying the decision in *Capital School District Benefits Specialist* (Supra., 1182), where parties have developed a sophisticated and successful method for sharing financial and other information concerning benefits in order to reach joint recommendations, it is more difficult to make the case that the employer is unduly burdened by having benefits positions represented.

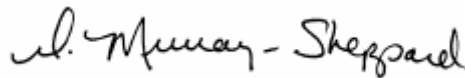
DECISION

Review of the record created by the parties and the specific circumstances unique to this case supports the conclusion that the Compensation and Pension Systems Coordinator position is not, at this time, a confidential employee within the meaning of 19 Del.C. §1310(f).

WHEREFORE, the Compensation and Pension Systems Coordinator remains a bargaining unit position and this petition is dismissed without prejudice.

IT IS SO ORDERED.

DATE: 9 July 2007



DEBORAH L. MURRAY-SHEPPARD
Hearing Officer
Del. Public Employment Relations Bd.